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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 123

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 6, 1919.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 405.

John Barton Payne ~~FRANKLIN K. LANE~~, SECRETARY OF THE INTERIOR, AND CLAY TALLMAN, COMMISSIONER OF THE GENERAL LAND OFFICE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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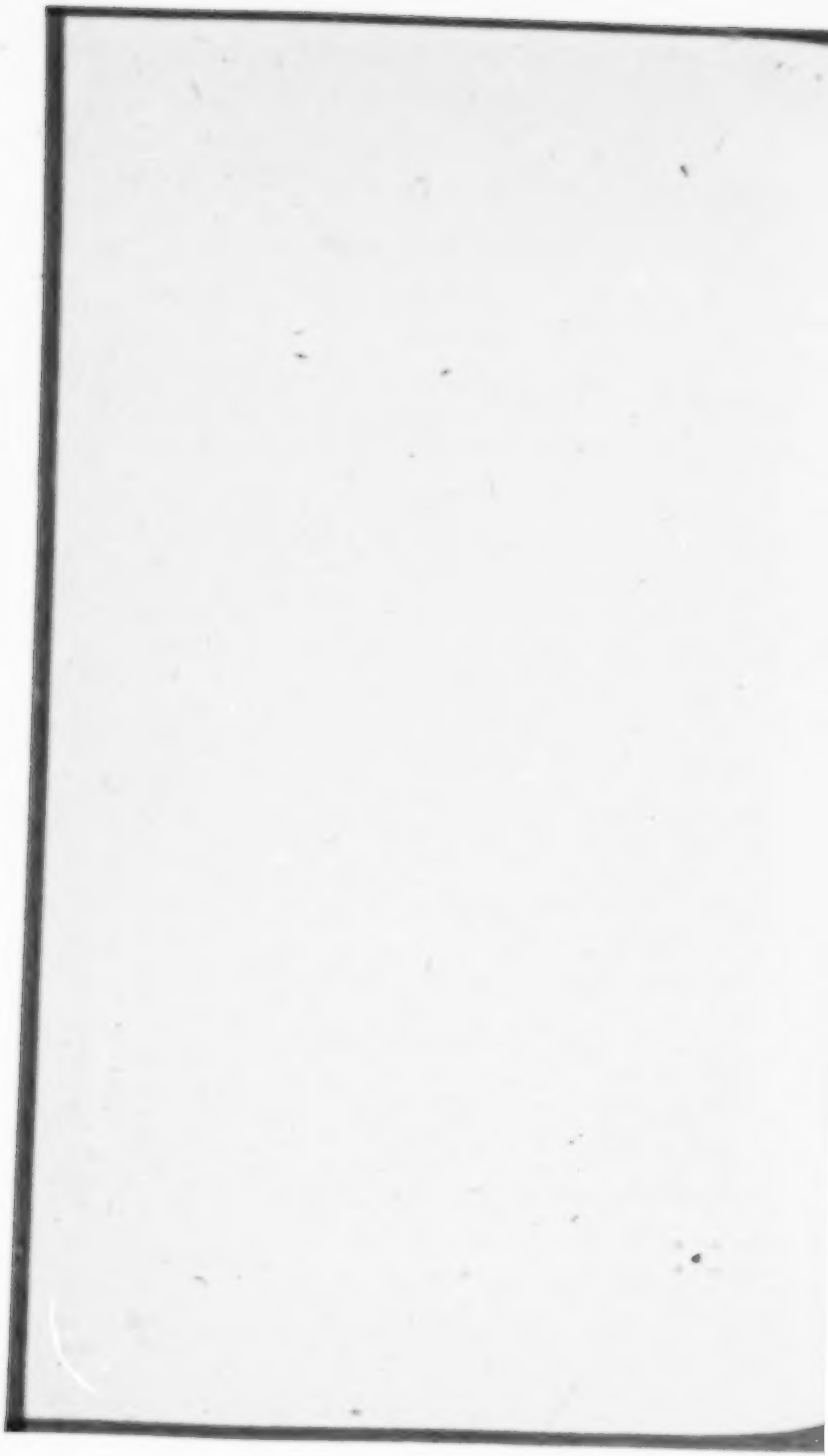

1 Court of Appeals of the District of Columbia.

FRANKLIN K. LANE, &c., ET AL., APPELLANTS,
vs.
U. S. EX REL. ALLEN L. NEWTON. | No. 3231.

Supreme Court of the District of Columbia

THE UNITED STATES OF AMERICA EX REL. Allen L. Newton, plaintiff,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office, defendants. | At Law. No. 61536.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Petition.

Filed August 5, 1918.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA EX REL. Allen L. Newton
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office. | At Law. 61536.

The petition of the United States on the relation of Allen L. Newton respectfully represents:

I.

That Allen L. Newton is a citizen of the State of Washington and brings this his petition for mandamus against Franklin K.
2 Lane, a citizen of the State of California, residing in the District of Columbia, in respect of the matters and things hereinafter set forth, and Clay Tallman, a citizen of the State of Nevada, residing in the District of Columbia.

II.

That at the several times hereinafter referred to, said respondents were and they still are, respectively, Secretary of the Department of

the Interior of the United States, and Commissioner of the General Land Office, and as such officers had and have, under the general supervision of the said Secretary of the Interior, charge of the administration of the laws of the United States relating to public lands, and that said respondents are sued in their official capacity aforesaid as hereinafter set forth.

III.

That the plat of survey of township 23 north, range 10 east, within the Seattle land district, in the State of Washington, was duly filed in the local land office Sept. 8, 1904, whereupon the public lands in said township became subject to entry and disposition under the homestead laws of the United States, and on that day your petitioner, Allen L. Newton, filed in the local land office at Seattle, his application and accompanying showing as required by the homestead laws and the lawful regulations of the Land Department for the entry of the northeast quarter of the southwest quarter, west half southwest quarter, and southwest quarter northwest quarter, section 20, township 23, north, range 10 east, which application was accompanied by the lawful fees and was duly received, and thereby entry was made of the lands under the homestead laws.

IV.

That after due notice by publication, your petitioner submitted proof in commutation of his homestead entry and paid the purchase price, whereupon receiver's receipt and certificate of final entry were issued to him Nov. 21, 1904.

V.

That at the expiration of two years from the issuance of the receiver's receipt on final entry, no contest, protest or other proceeding had been instituted against petitioner's said final entry; that on Nov. 27, 1908, more than four years after the issuance of the receiver's receipt on final entry, proceedings were directed against your petitioner's said homestead entry, urging failure to comply with the homestead law in the matter of residence and cultivation, and on these proceedings your petitioner's homestead entry was ordered canceled March 23, 1912. Thereafter, a petition was filed invok-

3 ing the supervisory authority of the Secretary of the Interior for the reinstatement and patenting of your petitioner's said homestead entry, based upon the proviso to section 7 of the act of March 3, 1891 (26 Stats., 1095, 1099), which reads:

"That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to

a patent conveying the land by him entered, and the same shall be issued to him."

VI.

That such further proceedings were thereafter had resulting in an order by the Secretary of the Interior dated May 14, 1918, and addressed to the Commissioner of the General Land Office, ordering the reinstatement and patenting of your petitioner's said entry. A copy of this order is hereto attached marked Petitioner's Exhibit "A" and made a part hereof.

VII.

That acting under the said direction of the Secretary of the Interior, the Commissioner of the General Land Office under date of June 4, 1918, duly approved your petitioner's entry for patent, and patent was about to be issued to your petitioner when, due to the intervention of the Department of Justice upon the request of the Secretary of Agriculture, the issuance of patent to your petitioner has been withheld.

VIII.

That notwithstanding the plain and unambiguous terms of the proviso to section 7 of the act of March 3, 1891, entitling your petitioner to a patent upon his said homestead entry, and notwithstanding the plain determination by the Supreme Court of the United States in the case of Franklin K. Lane *vs.* Svan Hoglund (244 U. S., 174), the patent is being withheld from your petitioner upon his homstead entry much to his annoyance, concern, and material damage, and irreparable injury:

Wherefore, the premises considered, your petitioner prays:

1. That a writ of mandamus may be issued and directed to the respondents, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, commanding them to deliver or cause to be delivered to your petitioner, a patent to the land herein described for the land covered by his said homestead entry, as by the act of March 3, 1891, exacted.

2. For such other and further right or rights, relief, or order as to the court may seem proper and the nature of petitioner's case may require.

4 To which end petioner prays that a rule may issue requiring the respondents herein, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, to show cause, if any they have, why the writ of mandamus should not issue herein as prayed.

ALLEN L. NEWTON.

STATE OF WASHINGTON, }
County of King, ss:

Allen L. Newton, being duly sworn, deposes and says that he is the petitioner herein; that he has read over and knows the matters alleged in said petition to be true except such matters as are alleged on information and belief, and as to those he believes they are true.

ALLEN L. NEWTON.

Subscribed and sworn to before me this 30th day of July, 1918.
[SEAL.]

E. C. EGLIN,
Notary Public in and for the State of Washington, Residing at Seattle.

ALEX. BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys.

PETITIONER'S EXHIBIT "A."
Department of the Interior,
Washington.

D. 18101. MAY 14, 1918.
Ex parte Allen L. Newton.

"R."
Seattle 0782.
Canceled homestead.
entry reinstated.
Patent to issue.

Petition for the exercise of supervisory authority.

The lands involved herein are the N. E. ¼ S. W. ¼, W. ½ S. W. ¼, and S. W. ¼ N. W. ¼, sec. 20, T. 23 N., R. 10 E., Seattle, Washington, land district. The township plat of survey was filed September 8, 1904, and on the same day Allen L. Newton made homestead entry for the above described land, alleging settlement about October 1, 1902. Commutation proof was submitted and final certificate issued thereon November 21, 1904.

5 The described lands are within the Snoqualmie National Forest, and November 27, 1908, proceedings were directed against the entry upon the adverse report of a forest officer, charging, in effect, that the entryman had not complied with the law in the matter of residence and cultivation. As a result of a hearing had thereon the entry was held for cancellation by the commissioner of the General Land Office on June 27, 1911, which action was affirmed by the department March 23, 1912, and the entry was canceled June 12, 1912.

January 29, 1918, claimant filed a petition for the exercise of supervisory authority of the Secretary, asking that the decision hold-

ing his entry for cancellation be reconsidered and the land patented to him under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), in view of the decision in the Supreme Court rendered May 31, 1917, in the case of Lane v. Hoglund (244 U. S., 174).

February 11, 1918, the petition was entertained and service thereof has been made upon the Solicitor of the Department of Agriculture, who has submitted a brief in reply thereto urging that the case should not now be reopened on account of the laches of claimant, no action in the department or court having been sought by him for the period of more than five years after cancellation of the entry. In support of this claim cases are cited in which the department has declined to reopen its final decisions because of a subsequent change by the department in the construction of the law as held at the time it was originally adjudicated.

In view of the decision of the Supreme Court in the Hoglund case, supra, and of the fact that no adverse claim to the land has been induced by the claimant's delay in invoking relief of the department, the cancellation of the entry is vacated, the entry reinstated and patent will issue.

(Signed) ALEXANDER T. VOGELSANG,
First Assistant Secretary.

Rule to show cause.

Filed August 10, 1918.

* * * * * * *

Upon consideration of the petition filed in the above-entitled case it is by the court this 10th day of August, 1918, ordered:

That the respondents Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, be, and they hereby are, required to show cause, if any they have, on or before the 13th day of September, 1918, at 10 o'clock a. m., why the writ of mandamus should not issue as in said petition prayed: Provided, That a copy of said petition and of this order be served upon said respondents on or before the 23rd day of August, 1918.

6 WILLIAM HITZ, *Justice.*

Marshal's return.

Served a copy of the within rule on Franklin K. Lane, Sect. Int., personally Aug. 14, 1918; Clay Tallman, Com. Gen. Land Office, personally Aug. 13, 1918.

MAURICE SPLAIN,
U. S. Marshal.

H.

Answer of respondents.

Filed September 12, 1918.

* * * * * * *

Come now Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, respondents in the above-entitled cause, and for answer to the rule to show cause why mandamus should not issue as prayed in relator's petition say:

1. They admit the averments in Paragraph I.

2. They admit the averments in Paragraph II with this exception: That said respondents were not Secretary of the Interior and Commissioner of the General Land Office, respectively, at any of the times specified in Paragraphs III and IV, nor at the times specified in Paragraph V prior to the filing of the said motion for supervisory authority mentioned in the last specified paragraph.

3. They admit generally the averments in Paragraph III, IV, V, VI, and VII, but do not concede or admit that the allowance of the homestead entry of said relator, Newton, or the issuance of the receiver's receipt and certificate of final entry thereon, set forth in Paragraphs III and IV, was with full knowledge of the facts with respect to said alleged settlement rights, residence and compliance with law with respect to said settlement and entry.

Further, respondents deny that upon the filing of the plat of survey of the township specified in Paragraph III, the public lands therein became subject to homestead entry generally. On the contrary, respondents aver that by reason of a prior withdrawal of said lands for forestry purposes, as hereinafter more specifically set forth, only such lands became subject to homestead entry, upon which there had been prior to the date of said withdrawal a bona fide settlement made and which had been continued from the initiation thereof up to the date of filing application for entry thereof in the proper United States land office.

4. They admit the allegation in Paragraph VIII with respect to the withholding of patent upon the said homestead entry of relator, Newton, but with respect to the other allegations contained therein say that they are mere conclusions of law to which they, the said respondents, are not required to answer.

7 5. For a further and complete answer to the rule, the respondents aver that on December 27, 1902, by order of the Secretary of the Interior, the lands involved herein with others were, with a view to their inclusion in a forest reserve, withdrawn from all settlement, entry, sale, or other form of disposal. The said order of withdrawal excepted from the force and effect thereof valid claims upon said lands properly initiated prior to the date thereof. Subsequently, by proclamation of the President dated March 2, 1907 (34 Stat., 3297), said land was made a part of the Washington National

Forest and said forest is now known and designated as the Snoqualmie National Forest.

Furthermore, the allowance of his entry, in face of the withdrawal of said lands, and the issuance of the receiver's receipt and register's final certificate on the proof tendered in support of said entry, were obtained by said relator Newton fraudulently and by false representations and proofs, to the effect that he had made settlement upon said lands prior to the withdrawal of said land as aforesaid and that he had since said settlement continuously resided upon the same and had placed substantial improvements thereon and had cultivated a portion of said land and raised crops thereon.

That the false proofs and representations were made and tendered by said Newton with full knowledge of their falsity and with intent to deceive the officials of the Land Department and thereby to induce them to allow his tendered filing and to accept his final commutation proof thereon and to issue to him the receipt and certificate aforesaid. The said officials were deceived thereby and did act in reliance upon said false and fraudulent representations.

The action of the Land Department in cancelling the homestead entry of relator, as averred in his petition, was predicated upon a specific finding by that department that the entryman therein, the relator, Newton, here, had not established and maintained residence upon the land covered by his homestead entry. Said decision was based upon evidence adduced on behalf of both the Government and claimant, Newton, at a hearing conducted pursuant to the rules of practice of the Land Department.

The decision of the Department of the Interior, upon the petition for exercise of supervisory authority by which the cancellation of the entry was vacated, the entry reinstated and direction for the issuance of patent thereon given, was predicated solely upon the ground of that department's supposed lack of jurisdiction to entertain the proceedings which resulted in the previous cancellation of the entry and was in no way based upon a reconsideration of the evidence in the case or a conclusion that the finding of facts in respect to failure to comply with the law, was erroneous. On the contrary, the said respondents allege that the evidence in the case clearly supports the conclusion that the issuance of final receipt and final certificate was fraudulently procured through false testimony, and if a patent had been issued upon said relator's entry, it would be the plain duty of the respondents to request the Attorney General to in-
8 stitute a suit in the proper court to secure the annulment and cancellation of such patent.

In view of the clear, unequivocal and convincing evidence of fraud by the said relator in procuring the allowance of his homestead entry and the issuance of the receiver's receipt and register's certificate thereon, the Attorney General, at the request of the Secretary of Agriculture and of these respondents, did institute on September 4, 1918, in the United States Court in and for the Western District of Washington, a suit in equity, styled United States of

America v. Allen L. Newton, Jane Doe Newton, and J. M. Ryley, which said suit is now pending and undetermined, to cancel the final receipt and certificate issued on the homestead entry of the said relator Newton, and to quiet title in the United States in and to land covered by said entry.

Wherefore, having made complete answer to the rule to show cause, the respondents pray that the same may be discharged, that the petition herein filed be dismissed with reasonable costs to these respondents, and they may be permitted to go hence without day.

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.

FRANCIS J. KEARFUL,
Assistant Attorney General;
LESLIE C. GARNETT,
Attorneys for Respondents.

DISTRICT OF COLUMBIA, *ss:*

Franklin K. Lane, Secretary of the Interior, being first duly sworn, says that he has read the foregoing answer and knows the contents thereof; that the matters and things set forth are true to the best of his knowledge and belief.

FRANKLIN K. LANE,
Secretary of the Interior.

Subscribed and sworn to before me this 11th day of September, 1918.

[SEAL.]
W. BERTRAND ACKER,
Notary Public in and for the District of Columbia.

Demurrer.

Filed September 20, 1918.

* * * * * * *

Comes now the relator by his attorneys, and says that the answer of the defendants to the rule to show cause issued in the above cause is bad in substance.

9 *Points to be argued.*

1. The decision of the United States Supreme Court in the case of Lane, Secretary of the Interior, *v.* Hoglund (244 U. S., 174), disposes of all matters set forth in the said answer.

2. The allegations of fraudulent representations by the relator are indefinite and insufficient to receive the attention of the court. In

so far, however, as disclosed they clearly indicate, what would be plain on a more definite statement, that they relate solely to the quality of the residence of the relator upon the land entered under the homestead laws and therefore involve a question of compliance with the homestead law respecting residence, inquiry into which was barred after the expiration of two years from the issuance of receiver's receipt on final entry, and cannot be inquired into in these proceedings.

ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys for Allen L. Newton.

Supreme Court of the District of Columbia.

FRIDAY, *October 25th, 1918.*

Session resumed pursuant to adjournment, Hon. Wendell P. Stafford, justice, presiding.

* * * * * * *

This cause came on to be heard upon the petition, the rule to show cause, the answer to said rule and petition and demurrer to said answer, and after argument by the respective attorneys of record, was submitted to the court. Whereupon, the same being considered, it is ordered that said demurrer be, and the same is hereby, sustained; thereupon the respondents by their said attorneys elect to stand upon said answer.

Wherefore, it is considered and ordered that the prayers of the petition be, and the same are hereby, granted and that a writ of mandamus be issued herein directed to the respondents, commanding them to deliver or cause to be delivered to the petitioner a patent to the land in said petition described for the land covered by his homestead entry, as by the act of March 3, 1891, enacted. Further, that the petitioner recover of said respondents his costs of suit and have execution therefor as the same are taxed by the clerk.

From the foregoing, the respondents, by their said attorneys, in open court, note an appeal to the Court of Appeals of the District of Columbia.

10 *Assignment of errors.*

Filed November 11, 1918.

* * * * * * *

Now come Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, defendants in the above numbered and entitled cause, and in connection with their petition for writ of error in this cause assign the following errors upon which they rely for a reversal of the judgment entered herein as appears of record:

1. That the court erred in sustaining the demurrer to the answer of the defendants filed in this cause.
2. That the court erred in not overruling the demurrer to the answer filed in this cause.
3. That the court erred in entering an order awarding a writ of mandamus.
4. That the court erred in not entering an order denying a writ of mandamus.

FRANCIS J. KEARFUL,
LESLIE C. GARNETT,
Attorneys for Plaintiffs in Error.

Designation of record.

Filed November 11, 1918.

* * * * * * *

For the purposes of the writ of error prayed and allowed herein on the —— day of ——, 1918, the clerk will please prepare a transcript of record, including therein the following:

1. Petition for a writ of mandamus, including all exhibits.
2. Rule to show cause.
3. Answer of respondents.
4. Order of court sustaining demurrer and ordering mandamus to issue.
5. Assignment of errors.
6. This præcipe.

FRANCIS J. KEARFUL,
LESLIE C. GARNETT,
Attorneys for Plaintiffs in Error.

O. K.:
F. W. CLEMENTS.

11 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 14, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 61536 at law, wherein The United States of America ex rel. Allen L. Newton is plaintiff and Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 22nd day of November, 1918.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

(Endorsed on cover:) District of Columbia Supreme Court. No. 3231. Franklin K. Lane, &c., et al., appellants, vs. U. S. ex rel. Allen L. Newton. Court of Appeals, District of Columbia. Filed Nov. 30, 1918. Henry W. Hodges, clerk.

12 Thursday, February 6th, A. D. 1919.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY Tallman, Commissioner of the General Land Office, appellants.
vs.
THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON. } No. 3231.

The argument in the above-entitled cause was commenced by Mr. L. C. Garnett, attorney for the appellants, and was continued by Mr. F. W. Clements, attorney for the appellee, and was concluded by Mr. L. C. Garnett, attorney for the appellants.

13 Court of Appeals of the District of Columbia.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND CLAY Tallman, Commissioner of the General Land Office, appellants.
vs.
THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON, appellee. } No. 3231.

Opinion.

Mr. Justice Van Orsdel delivered the opinion of the court:

This appeal is from a judgment of the Supreme Court of the District of Columbia, directing the issue of a writ of mandamus commanding respondents, Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, to issue and deliver to relator, Allen L. Newton, a patent to certain public lands of the United States.

It appears from the petition that, on September 8, 1904, a plat of survey containing the lands in question was filed in the local land office at Seattle, Washington; that, on the same day, relator filed a homestead entry thereon, and that, on November 21, 1904, he submitted proof in commutation of his entry and paid the purchase price required by law, whereupon a receiver's receipt and certificate of final entry were issued to him. On November 27, 1908, over four years after the issuance of the final receipt, proceedings were instituted against relator for the cancellation of his final receipt for

"failure to comply with the homestead law in the matter of residence and cultivation." As a result of this investigation, which appears to be the only one ever made, relator's entry was ordered cancelled March 23, 1912.

On May 14, 1918, the Secretary made an order, in part, as follows: "January 29, 1918, claimant filed a petition for the exercise of supervisory authority of the Secretary, asking that the decision holding his entry for cancellation be reconsidered and the land patented to him under the proviso to section 7 of the act of March 3, 1891 (26 Stats., 1095), in view of the decision in the Supreme Court rendered May 31, 1917, in the case of Lane v. Hoglund, 244 U. S., 174.

14 * * * In view of the decision of the Supreme Court in the Hoglund case, supra, and of the fact that no adverse claim to the land has been induced by the claimant's delay in invoking relief of the department, the cancellation of the entry is vacated, the entry reinstated and patent will issue." Following this order, the Commissioner of the General Land Office approved the entry for patent, but the Department of Justice, upon the request of the Secretary of Agriculture, intervened, and the issuance of the patent has since been withheld.

For answer, respondents admit the foregoing facts, but allege that the final receipt was procured "fraudulently and by false representations and proofs, to the effect that he had made settlement upon said lands prior to the withdrawal of said land as aforesaid and that he had since said settlement continuously resided upon the same and had placed substantial improvements thereon and had cultivated a portion of said land and raised crops thereon." It is further alleged that a suit in equity has been brought in the United States Court for the Western District of Washington for the cancellation of the final receipt and to quiet title to said land in the United States.

Relator demurred to the answer. On hearing, the demurrer was sustained, with judgment for relator.

The decision here must turn upon the interpretation to be placed upon the following proviso to section 7 of the act of Congress of March 3, 1891 (26 Stats. L., 1095, 1099): "That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him: but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor."

It is conceded that no contest or protest or any proceeding whatever was directed against this entry within two years after the issuance of the final receipt. But it is urged that, inasmuch as the proceedings for cancellation finally instituted were based upon alleged fraud, the action is not barred by the limitations of the foregoing statute. Many cases are cited by respondents to the effect that

proceedings in the Land Office to acquire title to public lands may be opened and set aside for fraud at any time prior to the issue of patent. But in no case has such a ruling been made in the face of a limitation terminating the Secretary's jurisdiction.

The provision of the statute before us was considered by this court in the case of Hoglund *v.* Lane, 44 App. D. C., 310. The facts in that case were substantially the same as in the case at bar. There, as here, cancellation of the entry was sought "on account of non-residence and lack of cultivation." The facts relied upon in the answer to sustain the jurisdiction of the department were substantially the same in both cases. The present case is differentiated, however, by the averment that, by reason of the alleged acts, the final receipt was fraudulently procured.

In any event, the court below properly sustained the demurrer. Accepting the contention of counsel for the Government that the department had jurisdiction to reopen the case, it could do so only on the ground of fraud discovered after the statute of limitations had run. In this, the answer fails to respond to an elementary rule of pleading, since no excuse is assigned for failure to discover the alleged fraud within the two-year period. In United States *v.* Diamond Coal & Coke Co., 254 Fed., 266, a bill of complaint attempting to annul patents to coal lands under section 8 of the present act was held defective for failure to allege "the time when the fraud was discovered, the circumstances of its discovery, what the discovery was, and why it was not made before so that the court may clearly see that the discovery could not have been made before by the exercise of ordinary diligence." This rule of pleading, however, is elementary. Wood *v.* Carpenter, 101 U. S., 135, 140, 143; Badger *v.* Badger, 2 Wall., 87, 95. The application of the rule is the same, whether the court is considering the sufficiency of a bill of complaint or, as here, an answer in which an attempt is made to plead fraud as an affirmative defense.

The vague and evasive language here employed to set up fraud, without any attempt to justify the delay, is indicative of a fictitious defense. The facts relied upon are not of such a character that their discovery need involve the Land Department in any difficulty whatever. Efficient administration would seem to dictate an inquiry into the facts before the issue of a final receipt, which would disclose fraud, if it existed, more readily and much more accurately than to negligently allow the investigation, as in this instance, to be postponed for years. The department has at its command officials, presumably capable, whose duty it is to make such investigations; hence, there is no excuse for failure to set forth the impediments, if any in fact exist, to an earlier discovery of the alleged fraud.

But treating the charge of fraud in the present case as completely distinguishing it in respect of the issues of fact from the Hoglund case, we think respondents' case is not strengthened. We there held the limitation was jurisdictional, and a bar to any action by the department against an uncontested entry, after the lapse of two years,

and that nothing remained for the department but the mere ministerial act of issuing a patent.

In the Hoglund case, construing the statute, we said: "It is clear that the above proviso is jurisdictional in its operation, and fixes a limitation beyond which the Secretary is without jurisdiction to question the right of an entryman to his patent. We are not estopped to construe the act by a departmental construction of it in this case. It is urged by counsel for the Government that it is merely a statute of limitations, and the petitioner waived its benefit by failing to take timely advantage of it. It is not a mere statute of limitations, which relates to and affects procedure, and could therefore be waived. It is a stunute of repose affecting and settling the title to real estate. It establishes a limitation within which the Government or a private individual may by protest or contest challenge the title of an entryman. When the time expires, the right ceases."

15 On appeal (Lane v. Hoglund, 244 U. S., 174), the Supreme Court, affirming this court, said: 'Looking, then, at the statute in the light of all that bears upon its purpose and meaning, we think it certainly and unmistakably lays upon the Secretary of the Interior, as the head of the Land Department, a plain duty to cause a patent to be issued to a homestead entryman whenever it appears, as concededly it did in this instance, that two years have elapsed since the issue of the receiver's receipt upon the final entry and that during that period no proceeding has been initiated or order made which calls in question the validity of the entry. In the exercise of its discretion Congress has said, in substance, by this statute that for two years after the entryman submits final proof and obtains the receiver's receipt the entry may be held open for the initiation of proceedings to test its validity, but that if none such be begun within that time it shall be passed to patent as a matter of course. Thus, in a case like this, where according to the conceded facts no proceeding was begun within the prescribed period, there is no room for the exercise of discretion or judgment, but on the contrary a plain duty to see that the entryman receives a patent."

The purpose of Congress in enacting this limitation, as reviewed at length in the opinion of the Supreme Court was to clear the Land Department of large numbers of entries which "were suspended by the General Land Office on vague and indefinite suggestions of fraud or noncompliance with law, to await investigation by special agents of that bureau. These suspensions were so numerous and the force available for investigation was so insufficient as to create a practical blockade in the issuance of patents to the serious prejudice of bona fide claimants under the public land laws."

This proviso, in conjunction with the next succeeding section of the act, discloses a design on the part of Congress not only to prevent delays in the Land Department and in the courts, but to establish the security of patent titles. Section 8, among other things, provides "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the

passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." This placed a limitation upon the bringing of suits in equity to annul patents, except in cases based upon fraud, in which the limitations of the statute do not begin to run until the discovery of the fraud. Exploration Co. et al. v. United States, 247 U. S., 435. The act indicates a clear intention on the part of Congress to fix a limitation upon the jurisdiction of the Land Department for any reason whatever to question the validity of an entryman's right to a patent, and a like limitation within which the patent may be annulled in a court of equity having jurisdiction of the res.

No reason has been advanced that would justify us in distinguishing the interpretation to be placed upon the statute in this case from that placed upon it in the Hoglund case. Indeed, the department was so convinced, until the intervention of the Agricultural Department through the Department of Justice; and the Department of Justice, out of abundant caution, has already instituted a suit in equity, apparently intending, if possible, to secure a judicial cancellation of the final receipt in advance of a final mandate compelling the issuance of a patent.

But it is urged that the issuance of a writ in this case would amount to a perpetuation of a fraud. Of course, mandamus is not a writ of right. Its function is to prevent fraud, and not to perpetuate it. But the question here is one of power. If the Land Department is without jurisdiction to act in the premises, fraud will not confer jurisdiction. The Congress has seen fit, at the termination of the two-year limitation after the issuance of a final receipt, if no contest or protest has been directed against the entry, to transfer jurisdiction of the whole subject matter from the department to the courts. A mere declaration of fraud can not restore the jurisdiction after it has been lost by the running of the statute of limitations. To resume jurisdiction in such a case recourse must be had to a proceeding in equity, a jurisdiction not possessed by the Land Department. The action here is not to perpetuate a fraud or to compel the performance of an act which would have that result. It is to compel the performance of a mere ministerial act imposed by statute. If fraud in fact exists, it can be remedied in the courts as Congress has expressly directed.

The judgment is affirmed with costs.

Affirmed.

Mr. Chief Justice SMYTH concurring specially.

The act of Congress under consideration, according to a decision of the Supreme Court of the United States, is a "statute of limitations and repose." Lane v. Hoglund, 244 U. S., 174, 178. Being a statute of limitations there is an implied condition therein that in case of fraud it shall not commence to run until the fraud is dis-

covered. "A statute of limitations," says Judge Story, "ought not, then, to be so construed as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation; and cases of fraud, therefore, form an implied exception, to be acted upon by courts of law and equity, according to the nature of their respective jurisdictions." Sherwood v. Sutton, 5 Mason, 143. The Supreme Court of the United States in construing a statute of limitations, section 8 of the act before us, approved the language of Judge Story just quoted, and said: "The cause of action did not accrue until the discovery of the fraud; that such was the undisputed doctrine of courts of equity, and that the weight of authority, English and American, applied the same rule to actions at law." Exploration Co. v. United States, 247 U. S., 435, 447. See also Bailey v. Glover, 21 Wall., 342; Rosenthal v. Walker, 111 U. S., 185, 190; State v. Stone Cattle Co., 66 Tex., 363, 367. It appearing by the petition of relator that at the time the Secretary of the Interior declined to deliver the patent more than two years had elapsed since the receiver's receipt and certificate of final entry were issued, it devolved upon the appellants to show that the fraud charged was not discovered by them two years before they took action to set aside the entry. This they failed to do in their answer, and, therefore, the right to further withhold the patent is barred.

I do not overlook the principle that a mandamus will not be awarded "to compel the performance of a wrong or to confirm or perpetuate a fraud." (Lane v. Duncan Townsite Co., 44 App. D. C., 63, 67; 245 U. S., 311); and if there was before us such evidence of fraud as we could consider I would be of the opinion that a mandamus should be denied. But a demurrer admits only such facts as are well pleaded (20 How., 108, 125), and the facts set forth in the answer are not well pleaded—are not pleaded so as to constitute a defense—and therefore must be put out of sight and the case considered as if they were not in it. This being so, the judgment awarding the writ should be affirmed.

Affirmed.

16 Monday, March 31st, A. D. 1919.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, and Clay Tallman, Commissioner of the General Land Office, appellants,
vs.
THE UNITED STATES OF AMERICA EX REL. Allen L. Newton.

No. 3231.
January Term, 1919.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and

adjudged by this court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. Justice Van Orsdel.

March 31, 1919.

Mr. Chief Justice Smyth concurring specially.

17 In the Court of Appeals of the District of Columbia.

April Term, 1919.

FRANKLIN K. LANE, THE SECRETARY OF THE INTERIOR, and Clay Tallman, the Commissioner of the General Land Office, appellants,
vs.
THE UNITED STATES OF AMERICA EX REL. ALLEN L. Newton, Appellee.
No. 3231.

Petition for writ of error.

Now come Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants in the above-entitled cause, and respectfully show that on or about the 31st day of March, 1919, this court entered a judgement herein in favor of the appellee, Allen L. Newton, and against the appellants, affirming the judgment of the Supreme Court of the District of Columbia sustaining a demurrer to the answer of the petitioners, appellants herein, in favor of the appellee, in which judgment certain errors were committed to the prejudice of the appellants, all of which will appear more in detail from the assignment of errors filed with this petition.

Wherefore, the appellants pray that a writ of error may issue in this behalf out of the Supreme Court of the United States for correction of the errors complained of and that a transcript of the record of proceedings in this cause, duly authenticated, be sent to the Supreme Court of the United States and the mandate of this court be stayed until further order.

FRANKLIN K. LANE,
Secretary of the Interior.

CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:
F. J. KEARFUL,
Assistant Attorney General.
LESLIE C. GARNETT, *Attorney.*

18 In the Court of Appeals of the District of Columbia.

April Term, 1919.

FRANKLIN K. LANE, THE SECRETARY OF THE INTERIOR, and Clay Tallman, the Commissioner of the General Land Office, appellants,
vs.
THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON, appellee.
No. 3231.

Assignment of errors.

Now come Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants in the above numbered and entitled cause, and in connection with their petition for a writ of error assign the following errors upon which they rely for a reversal of the judgment entered herein affirming the judgment of the Supreme Court of the District of Columbia directing the issuance of a writ of mandamus against the appellants:

1. The Court of Appeals erred in affirming the judgment of the Supreme Court of the District of Columbia in favor of the appellee Newton and directing the issuance of a mandamus against the appellants.

2. The Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia in favor of the appellee Newton and directing the issuance of a mandamus against the appellants.

3. The Court of Appeals erred in holding that the limitation in section 7 of the act of March 3, 1891 (26 Stat., 1095), is jurisdictional and a complete bar after the lapse of two years from the issuance of final receipt and certificate to any action against a fraudulent entry prior to the issuance of patent.

4. The Court of Appeals erred in not holding that the limitation in section 7 of the act of March 3, 1891 (26 Stat., 1095), is not jurisdictional and not a complete bar after the lapse of two years from the issuance of final receipt and certificate to any action against a fraudulent entry prior to the issuance of patent.

5. The Court of Appeals erred in holding that after the lapse of two years from the date of the issuance of the receiver's final receipt the Land Department is without jurisdiction to cancel the final receipt for fraud.

6. The Court of Appeals erred in not holding that after the lapse of two years from the date of the issuance of the receiver's final receipt the Land Department has jurisdiction to cancel the final receipt for fraud.

7. The Court of Appeals erred in holding that after the lapse of two years from the issuance of final receipt, the United States has

no right to invoke the aid of a court of equity to cancel for fraud the final receipt and certificate.

8. The Court of Appeals erred in not holding that after the lapse of two years from the issuance of final receipt, the United States has the right to invoke the aid of a court of equity to cancel for fraud the final receipt and certificate.

9. The Court of Appeals erred in affirming the judgment of the Supreme Court of the District of Columbia directing the issuance of a writ of mandamus pending the determination of the suit instituted in the United State Court for the Western District of Washington to cancel for fraud the final receipt and certificate.

10. The Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia directing the issuance of a writ of mandamus pending the determination of the suit instituted in the United States Court for the Western District of Washington to cancel for fraud the final receipt and certificate.

Wherefore, the appellants pray that for the errors aforesaid and other errors appearing in the record of the Court of Appeals
20 in the said cause to the prejudice of appellants, said judgment of the said Court of Appeals may be reversed and annulled and the said cause be remanded for such further proceedings as may be determined by the Supreme Court of the United States.

FRANKLIN K. LANE,
Secretary of the Interior.
CLAY TALLMAN,
Commissioner of the General Land Office.

By their attorneys:
F. J. KEARFUL,
Assistant Attorney General.
LESLIE C. GARNETT,
Attorney.

(Endorsed:) No. 3231. Franklin K. Lane, the Secretary of the Interior, and Clay Tallman, the Commissioner of the General Land Office, appellants, v. The United States of America ex rel Allen L. Newton, appellee. Petition for writ of error and assignment of errors. Court of Appeals, District of Columbia. Filed May 26, 1919, Henry W. Hodges, clerk.

21 Monday, May 26th, A. D. 1919.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, AND Clay Tallman, Commissioner of the General Land Office, Appellants,
vs.
THE UNITED STATES OF AMERICA EX REL. ALLEN L. NEWTON. } No. 3231.

On consideration of the petition for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the

United States, It is by the court this day ordered that the said writ issue as prayed.

22 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants, and The United States of America ex rel. Allen L. Newton, appellee, a manifest error hath happened, to the great damage of the said appellants as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 26th day of May, in the year of our Lord one thousand nine hundred and nineteen.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

23 UNITED STATES OF AMERICA, *ss:*

To the United States of America ex rel. Allen L. Newton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 26th day of

May, in the year of our Lord one thousand nine hundred and nineteen.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged May 27, 1919.

F. W. CLEMENTS,
Counsel for Appellee.

24 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 23, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals, in the case of Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, appellants, vs. The United States of America ex rel. Allen L. Newton, No. 3231, April term, 1919, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 27th day of May, A. D. 1919.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Endorsement on cover:) File No. 27160. District of Columbia, Court of Appeals. Term No. 405. Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, plaintiffs in error, vs. The United States of America ex rel. Allen L. Newton. Filed June 6, 1919. File No. 27160.

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